No. 98-341

In the Supreme Court of the United States

October Term, 1998

WEST LYNN CREAMERY, INC. and
LECHMERE DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER
OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a Massachusetts pricing order requiring all Massachusetts milk dealers to make premium payments based upon the amount of milk they sell in Massachusetts and providing for distribution of amounts to Massachusetts dairy farmers violate the interstate Commerce Clause?

PARTIES TO THE PROCEEDINGS

The petitioners in these proceedings are listed in the petition for certiorari at ii. The respondent is Jonathan Healy, the present Commissioner of the Massachusetts Department of Food and Agriculture, who is substituted for Gregory Watson, the former Commissioner of the Massachusetts Department of Food and Agriculture, pursuant to Supreme Court Rule 35.3.

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No. 93-141

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OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Jonathan Healy, Commissioner of the Massachusetts Department of Food and Agriculture

("Commissioner"), submits this brief in opposition to the petition for writ of certiorari ("Pet."). As used in this brief, the term "Commissioner" refers to the present Commissioner or, with respect to actions on or before June 11, 1993, his predecessor in office.

DECISIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, reproduced at pages A1-A13 of the appendix to the petition ("Pet. App."), is reported at 415 Mass. 8, 611 N.E.2d 239 (1993). The decisions of the Single Justice of the Massachusetts Appeals Court (Pet. App. A17-A21) and the Massachusetts Superior Court (Pet. App. A22-A26) concerning stay of the Commissioner's decisions are

not reported. The decisions of the Commissioner (Pet. App. A27-A40) are not reported.

JURISDICTION

The opinion of the Supreme Judicial Court was entered April 15, 1993. See Pet. App. A1. The petition was filed July 14, 1993, and was received by the Commissioner that day. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND REGULATORY PROVISIONS

The pertinent portion of the Commerce Clause of the Constitution of the United States provides that "The Congress shall have power . . . [t]o

regulate Commerce . . . among the several States . . . ." U.S. Constitution, Art. 1, § 8, cl. 3.

The text of the pricing order issued by the Commissioner is accurately set forth in the appendix to the petition. Pet. App. A41-A50.

STATEMENT OF THE CASE

An accurate statement of the case appears at pages A2-A8 (opinion of the Massachusetts Supreme Judicial Court) of the appendix to the petition.[1/] However, the decisions below do not succinctly set forth the terms of the pricing order, and the petitioners seek to characterize the pricing order and its purpose without fairly describing the order. As to that subject, the Commissioner also states as follows.

1/ Subsequent to that decision, the Supreme Judicial Court allowed the petitioners' motions seeking to stay issuance of that Court's rescript pending this Court's disposition of the petition and subsequent proceedings, if any. Pet. App. A15.

The Commissioner issued the pricing order on February 26, 1992, pursuant to the Massachusetts Milk Control Law, Mass. G.L. c. 94A, § 1 et seq. See Pet. App. A3 (opinion of the Supreme Judicial Court). The pricing order established a target price to be paid to Massachusetts producers above the minimum price established by the United States Secretary of Agriculture under the New England Milk Marketing Order No. 1, 7 C.F.R. § 1001, and the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 601 et seq.

Under the Massachusetts pricing order, all milk dealers doing business in Massachusetts are required to make premium payments to the Massachusetts Dairy Equalization Fund ("fund")

established under the order. Pet. App. A44.[2/] The premium payments are based on dealers' initial sales of Class I milk in Massachusetts multiplied by one-third of the difference between the Massachusetts target price and the federal Order No. 1 minimum blend price for a specific zone. Pet. App. A44. The milk dealers must report their sales and submit their premium payments for a given month to the Massachusetts Department of Food and Agriculture on a monthly reporting schedule due on or

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2/ The Legislature subsequently enacted legislation establishing the fund on the books of the Commonwealth. See Mass. St. 1992, c. 23, § 7 (inserting Mass. G.L. c. 29, § 2V).

before the 25th day of the following month, commencing with May 25, 1992 for the April 1992 reporting period. Pet. App. A43-A44.

By the fifth day of each month, the Commissioner is to make distributions from the fund to licensed Massachusetts producers (dairy farmers) according to a formula based upon each producer's proportion of milk produced in Massachusetts for the preceding month. Pet. App. A45-A46. The distributions are limited by caps on the dollars received per hundredweight ($15/cwt) and the amount of milk per farmer subject to the distributions (200,000 lbs/month). Pet. App. A46. Any balance remaining in the fund after distributions to the dairy farmers is to be returned to the

milk dealers in proportion to their contributions for the month. Pet. App. A47.

A milk dealer's premium payment is thus fixed by the target price, the federal minimum price, and the amount the dealer sells in Massachusetts. It is separate from the amounts paid by milk dealers to dairy farmers under the federal orders described by petitioners. Pet. 4-5.[3/] The petitioners thus wrongly characterize

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[3/] In the court below, petitioners expressly conceeded that "[f]or the purposes of this case, it is unnecessary to explore the differences between the Zone 21 [federal order] price and the market price." Brief for Plaintiffs-Appellants at 6 n.4.

the pricing order when they state that "milk dealers must pay the minimum Massachusetts price for all milk, even milk purchased out of state." Pet. 15. Milk dealers pay the federally established price, not the Massachusetts target price, for milk purchased from out-of-state producers.

Petitioners similarly confuse matters in footnote 3 of the petition by defining "Premium" as the difference between the Order No. 1 minimum price and the pricing order target price. Pet. 6 n.3. See also Pet. 7. The pricing order defines the dealers' "premium payments" as a sum of money calculated by multiplying Massachusetts sales by one third of the difference

between the federal minimum price and the Massachusetts target price.

While the pricing order was designed to benefit Massachusetts farmers, its purpose was not "economic protectionism and discrimination against competition in the Massachusetts milk market" as claimed in the petition. Pet. 17. In his Findings and Declaration of Emergency, the Commissioner expressed his concern for the dairy farmers in the Northeast and noted the need to assist farmers and maintain local supplies of fresh milk for consumers. See Pet. App. A55, A56. However, in the absence of a regional solution, the Commissioner issued the pricing order regulating local activities to "provide an immediate interim solution to the state

of emergency facing the Massachusetts dairy industry." Pet. App. A41. "Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk." Id.

As noted in the Commissioner's Findings, an analysis by Professor Lass of the University of Massachusetts presented at the hearings predicted that "without immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the report predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture." Pet. App. A54.

REASONS FOR DENYING THE WRIT

"A review on writ of certiorari is not a matter of right but of judicial discretion." Rules of the United States Supreme Court, Rule 10.1. Such a writ is to be granted "only when there are special and important reasons therefor." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892).

For the reasons set forth below, the petition does not satisfy the

traditional criteria which guide the Court's discretionary review. Accordingly, the petition should be denied.

I. THE COMMERCE CLAUSE ISSUE PRESENTED IS NOT OF SUCH GRAVITY AND GENERAL IMPORTANCE AS TO REQUIRE REVIEW BY THIS COURT.

While petitioners present this case as an opportunity for the Court to provide abstract guidance concerning the "constitutional parameters" of States' powers to regulate the milk industry, Pet. 12, the question of Commerce Clause limitations on the States' power has been explored in the numerous cases cited by the petitioners themselves.

Pet. 10.[4/] The Supreme Judicial Court only applied this Court's precedents and sustained the pricing order. The petitioners do not provide any reason to think that the legal issues presented by the petition are of importance to the nation other than to assert that the opinion of the Supreme Judicial Court conflicts with decisions of this Court, a point addressed in Part II, infra.

4/ Petitioners do not relate their lengthy discussion of federal regulation of the milk industry, Pet.4-6, to any issue presented for review. For example, they do not claim that the pricing order in any way conflicts with regulation by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 et seq., including the ability of the Secretary to set minimum prices for milk.

II. THE SUPREME JUDICIAL COURT'S DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The petitioners assert that the Supreme Judicial Court misapplied this Court's dormant Commerce Clause precedents in upholding the pricing order. They claim that (1) the Court below erroneously held that the order did not discriminate in purpose or effect against interstate commerce in light of Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), and (2) the Court below was required to and failed to consider less restrictive alternatives under Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). However, the Supreme Judicial Court correctly held that "the pricing order does not discriminate on its face, in evenhanded in its

application, and only incidentally burdens interstate commerce." Pet. App. A9.

A. The Pricing Order Does Not Discriminate Against Interstate Commerce.

The Supreme Judicial Court's conclusion that the pricing order does not discriminate against interstate commerce rests precisely on the manner in which the order requires milk dealers to make fund contributions. Pet. App. A9. As noted by the Court, the order applies evenhandedly to all dealers handling milk for sale in Massachusetts. Id. All milk dealers, regardless of their state of incorporation or principal place of business, must make premium payments with respect to the milk they sell in

Massachusetts, regardless of the source of the milk.

Most importantly for the instant petition, the Supreme Judicial Court pointed out that "[t]he pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin." Pet. App. A10. The dealers' premium is independent of the price the milk dealer has paid for the milk. Pet. App. A10.

The order thus differs from the regulation struck down in Baldwin because it does not regulate the amount the dealer pays to out-of-state dairy farmers. The statute in Baldwin was condemned because its prohibition on the sale of milk purchased for less than the New York state minimum price erected a

barrier to traffic between the states. 294 U.S. at 521. The pricing order here, however, does not "attempt[] to affect and regulate the price to be paid for milk in a sister state . . . ." Milk Control Bd. v. Eisenberg Farm Products Co., 306 U.S. 346, 353 (1939) (distinguishing Baldwin).

Assuming, without deciding, that the dealers had standing to assert the interests of out-of-state producers, Pet. App. A10, A11, the Supreme Judicial Court noted that the order provides the dealers with no incentive to purchase milk in Massachusetts instead of out-of-state. Pet. App. A10. Indeed, the United States Court of Appeals for the First Circuit has stated that the same Massachusetts pricing order creates

the opposite incentive. Kenneth Adams, et al. v. Gregory Watson as Commissioner, Massachusetts Department of Food and Agriculture, No. 93-1068, slip op. at 10, 1993 U.S. App. LEXIS 20569, *11 (1st Cir. August 13, 1993) (Massachusetts pricing order "virtually ensures dealers an incentive to purchase out-of-state milk") (affirming dismissal of out-of-state farmers' challenge to Massachusetts pricing order for lack of standing).5/ The pricing order says nothing about out-of-state milk and does not attempt to require dealers to pay

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5/ The appellant out-of-state producers in the Adams case have received an extension of time in which to petition for rehearing to September 15, 1993.

any amount to out-of-state farmers. It only requires payment of a non-discriminatory premium on all milk sold in the Commonwealth.

Petitioners' assertion that this Court "considered and rejected" this evenhandedness argument in Baldwin, Pet. 18, is wrong. Baldwin dealt with a statute of extraterritorial effect that required payment of a specific price to out-of-state farmers on pain of barring the sale of that milk in New York. 294 U.S. at 521. The pricing order here is concerned only with in-state sales and production. The order does not prevent the milk dealers from acquiring and selling in Massachusetts milk from any source they may choose. Cf. Polar Ice Cream & Creamery Co. v. Andrews, 375

U.S. 361, 378 (1964) (regulations requiring dealer to purchase milk from in-state producers). Nor does it "remove[] any economic incentive for a local distributor to purchase out-of-state milk . . . ." Polar, 375 U.S. at 376. The pricing order does not pose a barrier, but is neutral with respect to the importation of out-of-state milk.

The order is based on the amount of milk sold by each dealer in Massachusetts and sets only the target price received by Massachusetts producers. It accordingly falls within the long line of cases upholding state regulation of the pricing of milk produced in a state, see Milk Control Bd. v. Eisenberg Farm Products Co., 306

U.S. 346, 353 (1939); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 615 (1937), and of the sale of milk within a state, see Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm., 365 F. Supp. 1144, 1156 (M.D. La. 1973) (three judge court) ("there is no constitutional infirmity in a state regulation requiring that purely in-state transactions be governed by the Commission's pricing schedules . . . even though the product sold within the state and whose selling price is there regulated, originates outside of the state"), aff'd, 416 U.S. 922 (1974); Baxley v. Alabama Dairy Comm., 360 F. Supp. 1159, 1164 (M.D. Ala 1973) (three judge court); United Dairy Farmers Cooperative Assn. v. Milk Control Comm.,

335 F. Supp. 1008, 1014 (M.D. Pa.) (three judge court), aff'd, 404 U.S. 930 (1971).

With respect to the purpose of the pricing order, the Supreme Judicial Court correctly noted that the "fund distributions represent an infusion of capital designed solely to save an industry from collapse." Pet. App. A11. Such a purpose is legitimate. The States' power to promote the vitality of economic activity within the State is well established. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 877 n.6 (1985) ("promotion of local industry is a legitimate state interest in the Commerce Clause context"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984) ("a State may enact laws pursuant

to its police powers that have the purpose and effect of encouraging domestic industry."); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980) ("In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."); Parker v. Brown, 317 U.S. 341, 367 (1943) ("the adoption of legislative measures to prevent the demoralization of industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent congressional action, is a problem whose solution is particularly

within the province of the state."). Indeed, a state may subsidize domestic industry. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988). The distributions under the Massachusetts pricing order concern only the regulation of in-state transactions, and the purpose of benefitting Massachusetts dairy farmers without burdening out-of-state farmers does not violate the Commerce Clause. See Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992) (The "'negative' aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (quoting Limbach, 486 U.S. at 273-74) (emphasis added).

B. The Pricing Order Does Not Unduly Burden Interstate Commerce.

Respondents contend that the Supreme Judicial Court erred in applying the balancing approach of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), because the Court did not "consider the availability of any less restrictive alternatives to the pricing order." Pet. 20. However, they ignore both the nature of the "incidental burden" noted by the Supreme Judicial Court, Pet. App. A11, and the analysis called for under Pike.

The Supreme Judicial Court noted only that the fund distribution scheme "burdens" out-of-state producers "to the extent these producers are not entitled to receive fund distributions . . . ."

Pet. App. A11.[6/] The pertinent aspect of Pike only asks whether the local interest involved "could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981). The prevention of the collapse of a state industry could not be achieved by any way other than providing monies,

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6/ The Supreme Judicial Court correctly did not consider the collection of premium payments from the milk dealers to be a burden on interstate activities. See Pet. App. A13. The order requires premium payments based on all milk sold in the state by milk dealers. In so doing, the Order regulates only the essentially local activities of milk sales within Massachusetts. See cases cited at page 23, supra.

directly or indirectly, which would have the same "impact" on interstate activities, i.e., the absence of distributions to out-of-state producers, as the pricing order. None of petitioners' suggested alternatives - subsidies from tax revenues, tax relief, or even raising the price paid by dealers to Massachusetts farmers - lack this "impact."

III. ANY CONFLICT BETWEEN THE DECISION BELOW AND THE TWO UNAPPEALED DISTRICT COURT OPINIONS CITED BY PETITIONERS IS NOT REAL AND EMBARASSING.

Petitioners do not claim that the the Supreme Judicial Court of Massachusetts "has decided a federal question in a way that conflicts with the decision of another state court of

last resort or of a United States court of appeals." Supreme Court Rule 10.1(b). Instead, they assert that the decision is in "irreconcilable conflict" with decisions of two United States District Courts, Marigold Foods, Inc. v. Redalen, 809 F. Supp. 714 (D. Minn. 1992), and Farmland Dairies v. McGuire, 789 F. Supp. 1243 (S.D.N.Y. 1992). Pet. 13. The existence of these two district court decisions does not warrant plenary review by this Court. Even a conflict among appellate courts will not justify review unless it is "real and embarassing." Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). The conflict

asserted by the petitioners is neither real nor embarassing.

One of the two opinions, Marigold Foods, considered Commerce Clause issues only in the context of a motion for a preliminary injunction. 809 F. Supp. at 717, 719. The other case, Farmland Dairies, is distinguishable on its facts. As noted by the Supreme Judicial Court, the New York regulation at issue in Farmland Dairies "provided incentive for milk dealers to purchase milk produced in New York to reduce their milk purchasing expenses." Pet. App. A12 n.14 (citing 789 F. Supp. at 1248 & n.5). See also 789 F. Supp. at 1252. The pricing order provides no such incentive. There is thus no split of

authority that would warrant plenary review in this case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

JONATHAN HEALY, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

Respectfully submitted,

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